United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

213

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,650

SAI L. THANG, *et al.*,

Appellants,

vs.

S. F. & G., INC.,

Appellee.

Appeal From the United States District Court
For the District of Columbia

ROBERT CADEAUX
Attorney for Appellants

1525 New Hampshire Ave., N.W.
Washington, D.C.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

TABLE OF CASES

---

* Cases chiefly relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,650

SAI L. THANG, *et al.*,

Appellants,

vs.

S. F. & G., INC.,

Appellee.

Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF QUESTIONS PRESENTED

Whether the Court below erred in granting Defendant, Mildred Rose Neubauer's motion to dismiss the Amended Complaint for failure to join a party under Rule 19.

This is an original appeal and has not previously been before this Court.

JURISDICTIONAL STATEMENT

This appeal is from an order of the United States District Court for the District of Columbia (Smith, J.), dismissing Plaintiffs' Amended Complaint as to Defendants, Mildred Rose Neubauer and D. H. Stevens Co., for failure to join a party under Rule 19 (Federal Rules of Civil Procedure), filed July 31, 1970.

The District Court had jurisdiction under Section 521 of Title 11 of the District of Columbia Code, and this Court has jurisdiction under Title 28, Section 1291, of the United States Code.

REFERENCES TO RULINGS

Order dismissing Plaintiffs' Amended Complaint as to Defendants Mildred Rose Neubauer and D. H. Stevens Co. for failure to join a party under Rule 19 (July 31, 1970).

STATEMENT OF THE CASE

The Plaintiffs, Sai L. Thang and Bouachine Thang, sue to recover damages to and loss of various items of personal property due to the negligence and possibly conversion on the part of the owners of the apartment house in which Plaintiffs were tenants, and on the part of Defendant, D. H. Stevens Company, an agent of the owners or an independent contractor hired by the owners or their agents.

In the original Complaint, S. F. & G., Inc. was named as Defendant and owner of the apartment house, Hampton Courts, in question. Subsequent to the filing of the suit, it was learned that when the alleged damage and loss occurred, ownership of the apartment house was in the names of Defendant,

Mildred Rose Neubauer, Heather J. Neubauer, Richard J. Neubauer, and possibly others, of which only Defendant, Mildred Rose Neubauer, was amenable to service in the District of Columbia. Thereafter, with leave of the District Court, an Amended Complaint was filed dropping S. F. & G., Inc. and adding Mildred Rose Neubauer as Defendant.

After the Amended Complaint was filed, counsel for Defendant, Mildred Rose Neubauer, filed a motion to dismiss the Amended Complaint for failure to join a party under Rule 19 (Federal Rules of Civil Procedure). The motion was argued by counsel on July 30, 1970, and on July 31, 1970, the Court granted Defendant's motion, which is the order appealed herein.

The case at bar involved the loss and damage to the personal property of Plaintiffs, Sai L. Thang and his wife, Bouachine Thang, in their apartment while they were tenants in "Hampton Courts", located at 2013 New Hampshire Avenue, N.W., in the District of Columbia, owned by Defendant, Mildred Rose Neubauer, and others as tenants in common.

Plaintiffs, in their Amended Complaint, allege that on or about September 27, 1967, they observed water leakage in their apartment, number 811, and that they immediately notified the resident manager of the problem. Plaintiffs allege that on September 29, 1967, they received two visits from an agent, servant and/or employee of Defendant, D. H. Stevens Co., hired by the owner Defendant, who stopped the leakage and promised to return on the same date to make further repairs but failed to do so. Plaintiff allege that on October 2, 1967, the water pipe burst in the same place as before, and although immediate notice was given the agent of the owners, one of which is Defendant, Neubauer, nothing was done by said Defendant to stop the water flow. Plaintiffs were able to stop the deluge only with the help of another tenant approximately one and three-quarters hours later. Finally, Plaintiffs allege that

they were moved to another apartment, leaving many items of personal property in the previous apartment, in accordance with the agreement of the resident manager, so that they could be inspected, and that these items had been thrown away without notice to Plaintiffs.

Plaintiffs allege in their Amended Complaint that all of the damages suffered were caused by the negligence of Defendant, D. H. Stevens Co., and the acts, negligent acts or failure to act on the part of Defendant, Mildred Rose Neubauer, or their agents, servants and/or employees.

RULES INVOLVED

Rules 19 and 20, Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

1. Plaintiffs allege a cause of action sounding in tort against common owners of an apartment building and against a plumbing company acting either as an agent, servant and/or employee or as an independent contractor, hired by the owners or their agents. Since the liability of such joint tortfeasors is joint and several, all or one of them may be sued at the discretion of Plaintiffs. This being true, no additional parties are indispensable or necessary; therefore, Rule 19, Federal Rules of Civil Procedure, is inapplicable in this case, and it was error for the Trial Court to dismiss the Amended Complaint for failure to join a party under Rule 19. *Arguendo,* if Rule 19 is applicable, the Trial Court abused its discretion in finding any additional parties indispensable under Rule 19, subdivision (b).

ARGUMENT

I. THE COURT BELOW ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT FOR FAILURE TO JOIN A PARTY UNDER RULE 19.

A. It is well settled in the law of the District of Columbia and elsewhere that joint tortfeasors have joint and several liability and therefore any one or all may be sued at the discretion of the Plaintiff. "Since the liability of joint tortfeasors is joint and several, the plaintiff may sue one or more as he chooses." 2 Barron & Holtzoff, *Federal Practice & Procedure,* § 513.8 (Wright Ed. 1961).

"A tort action can be maintained against one or more of several tortfeasors, since their liability is both joint and several; and they are neither necessary nor indispensable parties." 3 A Moore's Federal Practice, §19.18[2] at 2571. See also *Ward v. Deavers,* 92 U.S. App. D.C. 167, 203 F.2d 72 (1953); *Carl Gutman & Co. v. Rohrer Knitting Mills,* 86 F. Supp. 506 (D.C. E.D. Pa. 1949); *Martin v. Chandler,* 85 F. Supp. 241 (D.C. N.Y. 1949).

B. Plaintiffs alleged negligence against one of several owners of an apartment building. As Plaintiffs allege that the owners are joint tortfeasors, their liability is joint and several.

Plaintiffs' Amended Complaint charges the owners of the subject apartment house, one of which is the Defendant, Mildred Rose Neubauer, with negligently acting or failing to act which resulted in tortous damage to Plaintiffs. Prior case law in the District of Columbia clearly establishes the landlord's liability, the owners here, in tort for failure to maintain a proper standard of care in maintaining the rented premises. In *Bailey v. Zlotnick,* 80 U.S. App. D.C. 117, 149 F.2d 505 (1945), the Court considered the liability of the landlord with respect to his tenants. In that case, with facts not dissimilar

from those in the case at bar, the landlord retained a third party to install a new hot water heating system. When the system was turned on, some of the pipes leaked causing the plaster in an apartment kitchen to fall, injuring Plaintiff. In holding the landlord liable even though the installer of the hot water system was an independent contractor, the Court in the *Bailey* case said:

> "The landlord was, nevertheless, under a duty not to create an unsafe condition on the premises either permanent or temporary by any affirmative action on his part . . . The landlord is, therefore, liable because his contractor has created a condition of the premises which it was his the landlord's duty not to create." 80 U.S. App. D.C. at 118.

In the case at bar, Plaintiffs not only allege negligence on the part of the owners through the plumbing company, D. H. Stevens Company, but also allege acts or failure to act on the part of the owners or their agents, which were negligent and in one instance would possibly amount to conversion. In paragraph 3 of the Amended Complaint, Plaintiffs allege that after discovering that the pipes were again leaking, and after notifying the resident manager, an agent or sub-agent of the owners, including Defendant, Neubauer, nothing was done until Plaintiffs were able to turn the water off with the aid of another tenant. In paragraph 5, Plaintiffs allege that property which was left in the apartment by agreement with the resident manager was thrown away without notice to the Plaintiffs. In view of the above, it is clear that Plaintiffs have stated a cause of action, sounding in tort, against the landlord owners, one of whom was Defendant, Mildred Rose Neubauer.

C. Joint owners may be joined at the discretion of Plaintiffs. In reviewing the applicable case law in the District of Columbia, it appears that there are no cases which decide specifically whether a number of individuals, owning property jointly and as landlords, as in the case at bar, are jointly and severally liable for torts, thereby permitting Plaintiffs to sue one, all or

any number of them. Nevertheless, the authorities as well as cases considered in a number of other jurisdictions are in general agreement that joint owners, such as those holding as joint tenants, tenants in common, etc., are jointly and severally liable for tortous liability resulting from the breach of duty involving the common held property. In Restatement, Torts § 848, it is stated:

> "Each of two or more persons who fail in the performance of a common non-contractual duty is liable for the entire harm of which such failure is the legal cause." *Id.* at 445.

and on the same page under Comment a it is stated:

> " . . . This is true although as between themselves one of them has the burden of performance and although their interests in the subject matter are unequal."

In I Harper and James, *The Law of Torts,* § 10.1 (1956), it is stated:

> " . . . [J]oint and several liability is imposed on each of a number of persons who fail to perform a common duty owed to the plaintiff and a single injury results. This rule is applicable to co-owners of property, such as joint owners of a negligently maintained building which falls and injures the plaintiff or his property." *Id.* at 699.

A case very similar to the one at bar was decided in *Kramer v. Stone,* 163 N.Y.S. 578, 176 App. Div. 549 (1917), wherein plaintiff tenants brought an action against their landlord for damages caused by an overflow of water. Their complaint alleged that the building was owned by twelve individuals, and the defendant asked for dismissal in that he was the only one of the twelve who was sued. In refusing the defendant's argument, the Court stated that the named defendant was admittedly one of the tenants in common owning the building and that:

> "The action is not upon contract, but is for damages for negligence on the part of the owners for failing to exercise

> due diligence in taking care of the portion of the building over which they retained dominion and control. In other words, the action is in tort, and the owners, as plaintiff alleges, are joint tort-feasors. In such case a plaintiff may sue all, or only a part, of the joint tort-feasors." *Id.* at 579.

In a like case, *Katz v. Preston,* 55 N.E. 2d 141, 73 Ohio App. 154 (1943), the Court of Appeals of Ohio refused to affirm the lower court's decision to grant defendant's demurer to the complaint for failure to join both co-owners of property occupied by plaintiff tenants. In that case, relying on an earlier Ohio case, the Court stated:

> "[L]iability for injury caused by defective condition of real estate results from occupation and control and not upon title, and the injured person could elect to sue any one without joining the others." *Id.* at 142.

Again, in *Donnelly v. Larkin,* 98 N.E. 2d 280, 227 Mass. 287 (1951), the Supreme Judicial Court of Massachusetts upheld the right of plaintiffs to sue one or more joint tortfeasors as they so elect. Here, the Court refused to direct a verdict in favor of defendants because the plaintiffs failed to join all the co-owners of an apartment building where plaintiff was injured.

> "[W]e are of the opinion that there was no error in the order of the court, wherein the judge rule that, in an action of tort such as this, the plaintiff need not join all of the tenants in common." *Id.* at 285.
>
> " . . . The action is merely *ex delicto,* and title of the defendants would not be affected by a verdict upon the issue." *Id.* at 285.
>
> " . . . It is a familiar rule of law, that in cases of tort, where two or more are liable to an action, they are liable jointly and severally, and therefore if one is sued alone, it is no ground of abatement that others who are liable are not sued." *Id.* at 285.

D. Rule 19 is inapplicable to a case wherein all claims asserted against the named Defendants are based on joint and several tort liability.

Rule 19, Federal Rules of Civil Procedure, concerns the joinder of persons needed for just adjudication. The gist of the rule as it concerns this appeal is that, paragraph (a), a party shall be joined if in his absence complete relief cannot be accorded among those already parties, or that dispositions without him may be prejudicial to his rights or subject other parties to possible multiple obligations. Paragraph (b) of the rule sets forth what procedure and tests the court should follow in the event that a party of the category named in paragraph (a) cannot be joined, as to whether such party is indispensable and the case cannot go on without him or whether such party is merely necessary or "conditionally necessary" allowing the case to proceed without him.

Rule 19 concerning joinder of parties for just adjudication has a history to the beginning of the federal court system in 1789. 3A *Moore's Federal Practice* § 19.01-1[1]. Nevertheless, from the early days of the rule, to its adoption in the Federal Rules of Civil Procedure, to its present form as revised in 1966, it concerns only two types of parties, those indispensable and those conditionally necessary.

> "Revised Rule 19 does not break with its background tradition. It continues to deal with necessary and indispensable parties . . . " 3A *Moore's Federal Practice* § 19.01-1[1].
>
> "Rule 19 deals with compulsory joinder of parties, *i.e.*, necessary and indispensable parties. In sharp contrast, Rule 20 deals with premissive joinder of parties, *i.e.*, proper parties in the sense of who *may* join as plaintiffs or be joined as defendants." 3A *Moore's Federal Practice* § 19.01-1[5].
>
> "Rule 19, therefore, deals *only* (emphasis added) with two classes of parties – necessary, or more accurately speaking,

> conditionally necessary, and indispensable parties. It is substantially a restatement of the practice prevailing under the original Rule 19, and thus a restatement of the practice prevailing prior to the adoption of the Federal Rules." 3A *Moore's Federal Practice* § 19.02 at 2146.

As it is clear from the above that Rule 19 concerns itself only with necessary or "conditionally necessary" parties and indispensable parties, it is equally clear that joint tortfeasors fit in neither category but are instead merely proper parties who may be joined under Rule 20, Federal Rules of Civil Procedure. Case law in the District of Columbia, in the vast majority of Federal Courts, and as heretofore cited, in the leading state jurisdictions support this proposition. The leading case in the District of Columbia is *Ward v. Deavers*, 92 U.S. App. D.C. 167, 203 F.2d 167 (1953). Here the plaintiff sued for recission of operating agreement whereby plaintiff acquired the right to purchase a business, and for fraud. The trial court found in a small amount for plaintiffs and both sides appealed. On appeal, the defendants argued that since one of the parties to the contract had never been joined (one Deavers), the lower court lacked jurisdiction to hear the case. The Appeals Court found that as to the action on the contract, "Such a situation may present an occasion for application of Rule 19(b), Federal Rules of Civil Procedure." *Id.* at 170, but went on to say as to the allegations of fraud, Rule 19 was not applicable.

> "On the other hand, if the court finds the plaintiff was entitled to tort damages against persons actually served, Deavers' (the party to the contract not served) presence before the Court is neither indispensable nor necessary." *Id.* at 170.

See also *Carl Gutmann & Co. v. Rohrer Knitting Mills*, 86 F. Supp. 506, 9 F.R.D. 67 (D.C. E.D. Pa. 1949); "A joint tort-feasor is not an indispensable party to an action against another tort-feasor. Either of them can be sued separately."

United States v. Goodman, 287 F.2d 871, 4 F.R. Serv. 2d 12b. 34, Case 2 (C.A. 5th 1961); "Joint tort-feasors are not indispensable parties in an action against one or more of them." *Champion Spark Plug Co. v. Karchmar,* 180 F. Supp. 727, 3 F.R. Serv. 2d 19a.1, Case 4 (D.C. S.D. N.Y. 1961); *Humble Oil & Refining Co. v. Harang,* 262 F. Supp. 39, 10 F.R. Serv. 2d 19a.1, Case 20 (D.C. E.D. La. 1966); *Debbis v. Hertz Corp.,* 269 F. Supp. 671, 11 F.R. Serv. 2d 19a.1, Case 3 (D.C. D. Md. 1967); "Tortfeasors are not indispensable or necessary since their liability is both joint and several." 3A Moore's Federal Practice, § 19.11 at 2364.

From a review of these authorities, it is clear that joint tortfeasors are not of the category contemplated by Rule 19 and it was clear error for the trial court to dismiss the Amended Complaint on the basis of Rule 19.

E. *Arguendo,* if Rule 19 were applicable to the case at bar, the trial court abused its discretion in finding the common owners of the property in question who were not joined for the reason that they resided outside the jurisdiction of the court, indispensable parties under Rule 19, paragraph (b).

In considering the four factors included within the rule but not limited to these factors, the trial court failed to weigh heavily the allegations of tort against the owners of the property and that which necessarily follows, joint and several liability as between each of the joint tort-feasors. Neither the absent potential party defendants nor the joined defendants would be prejudiced by failing to join all potential defendants in that it is well established that under the laws of the District of Columbia and elsewhere, plaintiffs may seek receovery against any or all joint tort-feasors but can get only one satisfaction. Of the four factors included in Rule 19(b), the fourth, "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder," is clearly the most important here in applying the "equity and good conscience"

mandate of paragraph (b). As cited by Plaintiffs in their opposition to Defendant's Motion to Dismiss, Plaintiffs were unable to join all the co-owners as some lived in Virginia and only the one co-owner, Defendant, Mildred Rose Neubauer, resided in the District of Columbia, and was amenable to service. The fact that there is no forum where all of the joint owners can be joined works an extreme hardship on the Plaintiffs to the extent that they may be without remedy. *Fouke v. Schenewerk,* 197 F.2d 234 (C.A. 5th, 1952); 3A Moore's Federal Practice, § 19.07-2[4].

CONCLUSION

Appellants respectfully request that the Order of Dismissal entered by the United States District Court for the District of Columbia be reversed, and that the case be remanded to the District Court allowing Plaintiffs to proceed with their action.

ADDENDUM

Rule 19, Federal Rules of Civil Procedure, Joinder of Persons Needed For Just Adjudication.

"(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"(c) Pleading Reasons For Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.

"(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23."

Rule 20, Federal Rules of Civil Procedure, Permissive Joinder of Parties.

"(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Respectfully submitted,

ROBERT CADEAUX
1525 New Hampshire Ave., N.W.
Attorney for Appellant

INDEX TO APPELLANTS' APPENDIX

APPENDIX

DOCKET ENTRIES

DATE	
1969	
August 1	Complaint, appearance filed
August 1	Summons, copies (2) and copies (2) of Complaint issued #2 N F 8/26/69
September 8	Summons, copy (1) and copy (1) of complaint issued to deft #2 ser 9/9/69
September 22	Answer of deft #2 to complaint; c/m 9/19/69; appr. of Patrick J. Attridge. filed
1970	
March 23	First notice under Rule 13
April 3	Motion of pltfs. to file amended complaint; c/m 4-1-70; P&A; exhibit; M. C. filed
April 3	Motion of pltf. to enlarge time; c/m 4-1-70; P&A; M. C. filed
April 6	Change of address of Middleton, Jasen & Cadeaux to 1525 N. Hamp. Ave., N.W. 20036; AC/N. filed
May 20	Order granting leave to amend complaint. (N) Smith, J.
May 21	Amended complaint; c/m 4/1/70 adding Mildred Rose Neubauer filed
June 9	Summons, Copy (1) and Copy (1) of amended complaint issued deft. #1. Serv. 6-15-70. filed
June 24	Motion of deft. Mildred Rose Neubauer, to dismiss amended complaint; P&A; c/m 6/24/70; M.C. filed
July 9	Opposition of pltf. to motion to dismiss amended complaint; P&A; c/m 7/8/70 filed
July 31	Order dismissing case as to defendants Mildred Rose Neubauer and D. H. Stevens Co. (N) Smith, J.
August 21	Notice of appeal by pltfs. from order of July 31, 1970; deposit $5.00 by Cadeaux; copies mailed to Patrick C. Attridge and Paul H. Weinstein filed

[Filed August 1, 1969]

* * * * *

COMPLAINT
(Negligence)

1. On or about September 27, 1967 and at all other times relevant, Plaintiffs were lesees of Apartment No. 811 in an apartment house known as "Hampton Courts", located at 2013 New Hampshire Avenue, Northwest, in the District of Columbia, of which Defendant S.F.&G., Inc. was the lessor.

2. On or about September 27, 1967, at about 6 P.M., Plaintiff Sai L. Thang observed water dripping from the bathroom celing [sic] of his apartment, and immediately notified the resident manager, an employee of Frank S. Phillips, Inc., management agents of the landlord. At about 4 P.M. of the following day, an agent or employee of Defendant D.H. Stevens Co. appeared at Plaintiffs' apartment, examined the leak and said that he would return the following day because he did not have the proper tools; at 5 P.M. on September 29, 1967, he returned, stopped the leakage of water and advised Plaintiffs that he would return on October 2, 1967 to complete the repairs, but did not return on that date.

3. At about 9:15 P.M. on October 2, 1967, the pipe in Plaintiffs' bathroom ceiling burst again at the point where it had been negligently repaired, and a large volume of water poured from the ceilings of other rooms and closets of the Plaintiffs' apartment. Plaintiff, Sai L. Thang, notified the resident manager at once, but nothing was done to stem the deluge until 11 P.M., when said Plaintiff, with the aid of another tenant, was able to turn off the water control valve in the basement of the building.

4. As a result of the negligence of Defendant, D.H. Stevens Co., either the agent of Defendant, Mildred Rose Neubauer, or an independent contractor, and the negligent failure to act on the part of the agent of Defendant, Mildred

Rose Neubauer, Plaintiffs suffered water damage and loss of their personal property, and the cost of alternative living accomodations, food and incident transportation, domestic services and loss of income, in the sum of $20,000.00.

5. On October 5, 1967, the Defendant landlord provided another apartment for Plaintiffs, to which Plaintiffs moved, leaving many damaged items of personal property in the old apartment, with the agreement of the resident manager, so that they could be inspected by the parties responsible for the damage. On the same day, Plaintiff, Sai L. Thang, notified Defendant, D.H. Stevens Co., that such articles were available for inspection, and again on October 5, and was then instructed by said Defendant to contact the Floyd E. Davis, Co., apparently also a real estate management agent for the building, which he did. He was then requested by the latter to submit details in writing, which was sent on October 23, 1967, and was thereupon instructed to contact the insurance company for Defendant, D.H. Stevens Co., which he did. An insurance representative finally appeared at the premises for inspection on November 13, 1967. Upon requesting the keys to the old apartment, Plaintiff, Sai L. Thang, was advised by the resident manager that the apartment had been re-rented and all articles in the apartment had been negligently thrown away without notice to Plaintiffs. The value of such articles was $12,000.00.

WHEREFORE, Plaintiffs demand judgment against Defendants, or either of them in the sum of $20,000.00 plus costs, and punitive damages in the sum of $25,000.00.

/s/ Robert Cadeaux

Robert Cadeaux
Attorney for Plaintiffs
Suite 512, Barr Building
910 17th Street, N.W.
Washington, D.C. 20006
Tel. No. 296-0670

[Filed September 22, 1969]

* * * * *

ANSWER OF DEFENDANT, D. H. STEVENS CO.

Comes now the defendant, D. H. Stevens Co., by and through its attorney, and for answer to the complaint filed herein avers as follows:

1. The defendant, D. H. Stevens Co., admits that it is a corporation authorized to do business in the District of Columbia and engaged in the plumbing business

2. The defendant, D. H. Stevens Co., denies that it was negligent; denies that the plaintiffs were injured or damaged by reason of its negligence and denies each and every other allegation of the complaint.

3. The defendant, D. H. Stevens Co., says that the injury or damage to the plaintiffs, if any, was the result of the sole and/or concurrent negligence of the plaintiffs and the co-defendant, S. F. & G., Inc., in failing to take the necessary steps to protect the plaintiff's property and to mitigate the damages to that property.

WHEREFORE, the premises considered, the defendant, D. H. Stevens Co., prays that the said complaint be dismissed with costs.

/s/ Patrick J. Attridge

Patrick J. Attridge
529 Southern Building
805 15th Street, N. W.
Washington, D.C. 20005
638-1877
Attorney for Defendant, D. H. Stevens Co.

[Filed April 3, 1970]

* * * * *

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs move the Court for leave to file an amended complaint, a copy of which is hereto attached as Exhibit A, on the ground that Plaintiffs have learned that Defendant, S.F. & G., Inc., was not the owner of the property referenced in the case herein, but, in fact, the property was owned by others, one of which is added as party defendant.

/s/ Robert Cadeaux

Robert Cadeaux
Attorney for Plaintiffs
1525 New Hampshire Avenue N.W.
Washington, D.C. 20036
Tel. No. 265-3665

[CERTIFICATE OF SERVICE]

[Filed May 20, 1970]

* * * * *

ORDER

Upon consideration of the Motion of Plaintiffs for leave to amend their Complaint for the reason that Defendant, S.F.&G., Inc., was not the title owner of the property referred to in the case herein, but, in fact, the property was owned by others, and it appearing to the Court that said Motion should be granted, it is this 20th day of May, 1970,

ORDERED:

That the Motion of Plaintiffs for leave to amend their Complaint be, and is hereby, granted.

/s/ John Lewis Smith, Jr.
JUDGE

[CERTIFICATE OF SERVICE]

[Filed May 21, 1970]

* * * * *

AMENDED COMPLAINT
(Negligence)

1. On or about September 27, 1967 and at all other times relevant, Plaintiffs were lessees of Apartment No. 811 in an apartment house known as "Hampton Courts", located at 2013 New Hampshire Avenue N.W., in the District of Columbia, of which Heather J. Neubauer, Richard J. Neubauer, and Defendant, Mildred Rose Neubauer, were lessor.

2. On or about September 27, 1967, at about 6 P.M., Plaintiff, Sai L. Thang, observed water dripping from the bathroom ceiling of his apartment, and immediately notified the resident manager, an employee of Frank S. Phillips, Inc., management agents of the landlord. At about 4 P.M. of the following day, an agent or employee of Defendant, D.H. Stevens Co., appeared at Plaintiffs' apartment, examined the leak and said that he would return the following day because he did not have the proper tools; at 5 P.M. on September 29, 1967, he returned, stopped the leakage of water and advised Plaintiffs that he would return on October 2, 1967 to complete the repairs, but did not return on that date.

3. At about 9:15 P.M. on October 2, 1967, the pipe in Plaintiffs' bathroom ceiling burst again at the point where it had been negligently repaired, and a large volume of water poured from the ceilings of other rooms and closets of the Plaintiffs' apartment. Plaintiff, Sai L. Thang, notified the resident manager at once, but nothing was done to stem the deluge until 11 P.M., when said Plaintiff, with the aid of another tenant, was able to turn off the water control valve in the basement of the building.

4. As a result of the negligence of Defendant, D.H. Stevens Co., either the agent of Defendant, Mildred Rose Neubauer, or an independent contractor, and the negligent failure to act on the part of the agent of Defendant, Mildred Rose Neubauer, Plaintiffs suffered water damage and loss of their personal property, and the cost of alternative living accomodations, food and incident transportation, domestic services and loss of income, in the sum of $20,000.00.

5. On October 5, 1967, the Defendant landlord provided another apartment for Plaintiffs, to which Plaintiffs moved, leaving many damaged items of personal property in the old apartment, with the agreement of the resident manager, so that they could be inspected by the parties responsible for the damage. On the same day, Plaintiff, Sai L. Thang, notified Defendant, D.H. Stevens Co., that such articles were available for inspection, and again on October 5, and was then instructed by said Defendant to contact the Floyd E. Davis Co., apparently also a real estate management agent for the building, which he did. He was then requested by the latter to submit details in writing, which was sent on October 23, 1967, and was thereupon instructed to contact the insurance company for Defendant, D.H. Stevens Co., which he did. An insurance representative finally appeared at the premises for inspection on November 13, 1967. Upon requesting the keys to the old apartment, Plaintiff, Sai L. Thang, was advised by the resident manager that the apartment had been re-rented and all articles in the apartment had been negligently thrown away without notice to Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against Defendants, or either of them in the sum of $20,000.00, plus costs, and punitive damages in the sum of $25,000.00.

/s/ Robert Cadeaux

Robert Cadeaux
Attorney for Plaintiffs
1525 New Hampshire Avenue N.W.
Washington, D.C. 20036
Tel. No. 265-3665

[CERTIFICATE OF SERVICE]

[Filed June 24, 1970]

* * * * *

MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO JOIN A PARTY UNDER RULE 19

Comes now defendant, Mildred Rose Neubauer, by and through her counsel, LEVITAN, CRAMER & WEINSTEIN, and moves this Court pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure to dismiss the Amended Compalint filed herein for failure to joint a party under Rule 19 of the Federal Rules of Civil Procedure. The grounds for the Motion are as follows:

As plaintiffs allege in their Amended Complaint the lessors of the property involved herein, known as "Hampton Courts", located at 2013 New Hampshire Avenue, N.W., in the District of Columbia, are Midlred Rose Neubauer, Heather J. Neubauer, and Richard J. Neubauer. Plaintiffs have failed to join Heather J. Neubauer and Richard J. Neubauer as defendants. In the absence of Heather J. Neubauer and Richard J. Neubauer complete relief cannot be accorded among those already parties as said persons are indispensable to complete and just adjudication.

WHEREFORE, defendant Mildred Rose Neubauer requests that the Amended Compalint be dismissed.

LEVITAN, CRAMER & WEINSTEIN

By /s/ Paul H. Weinstein

Paul H. Weinstein
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
659-3636

[Certificate of Service filed 24 June, 1970]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO JOIN A PARTY UNDER RULE 19

1. Rule 12(b)(7) of the Federal Rules of Civil Procedure.

2. Rule 19 of the Federal Rules of Civil Procedure.

LEVITAN, CRAMER & WEINSTEIN

By /s/_____

Paul H. Weinstein
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
659-3636

[Filed July 9, 1970]

* * * * *

OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs, through counsel, oppose Defendant's motion to dismiss the amended complaint for failure to join a party under Rule 19, and for grounds, state as follows:

1. The property in question is owned by Mildred Rose Neubauer, Heather J. Neubauer and Richard J. Neubauer, as tenants in common. The latter two parties, Heather J. Neubauer and Ricahrd J. Neubauer were not joined as parties for the reason that both reside in Springfield, Virginia, outside the jurisdiction of this Court, and not amenable to service of process. If the present suit were dismissed or dropped and refiled in Virginia, the present Defendant, Mildren Rose Neubauer, would likewise not be amenable to service of process, and the other co-tenants would present an identical objection as presented here.

2. According to Rule 19(b) of the Federal Rules of Civil Procedure, the Court must determine whether in equity and good conscience the action should proceed among the parties before it. One of the prime considerations noted within the Rule is whether Plaintiff will have an adequate remedy if the

action is dismissed for non-joinder. As stated in paragraph 1 above, because the Defendants reside in different jurisdictions, Defendants could always assert the defense of non-joinder and deprive Plaintiffs of any remedy at all.

3. Those Defendants who are amenable to service have been joined. The remaining potential Defendants are tenants in common of the real property involved. No injustice would be done them by permitting the instant case to go forward, since they share common questions in fact and liability with the joined tenant in common. Existing Defendant, Mildred Rose Neubauer, will in any event be able to recover the amount of any judgment rendered herein in excess of her proportionate obligation by means of contribution from the foreign potential Defendants, joint obligators, or other appropriate remedy. Plaintiffs should not be penalized by reason of the multiplicity of Defendants. Parties to the basic lease to Plaintiffs are joint obligators since all of them promised the same performance.

/s/

Robert Cadeaux
Attorney for Plaintiffs
1525 New Hampshire Avenue N.W.
20036
Washington, D.C.
Tel. No. 265-3665

[Certificate of Service filed July 8, 1970]

* * * * *

POINTS AND AUTHORITIES

1. Rule 19, Federal Rules of Civil Procedure.
2. Welch v. Sherman, 112 U.S. App. D.C. 124 (1962).

3. The record herein.

/s/
Robert Cadeaux
Attorney for Plaintiffs
1525 New Hampshire Avenue N.W.
20036
Washington, D.C.
Tel. No. 265-3665

[Filed July 31, 1970]

* * * * *

ORDER

Upon consideration of the defendant's Motion to Dismiss, this matter came on for hearing upon oral argument of counsel this 30th day of July, 1970, and the Court having considered argument of counsel, it is this 21st day of July, 1970,

ORDERED, that the above entitled matter be and it is hereby dismissed as to the defendants Mildred Rose Neubauer and D.H. Stevens Co.

/s/ J. Smith, Jr.
JUDGE

[Filed August 21, 1970]

* * * * *

NOTICE OF APPEAL

Notice is hereby given that Sai L. Thang and Bouchine Thang, Plaintiffs in the above referenced cause, hereby appeal to the United States Court of Appeals for the District of Columbia, from an order dismissing the case as to Defendants, Mildred Rose Neubauer and D.H. Stevens Company, for faulire

to join a party, entered in this action on the 31st day of July, 1970.

/s/ Robert Cadeaux

Robert Cadeaux
Attorney for Plaintiffs
1525 New Hampshire Avenue, N.W.
20036
Washington, D.C.
Tel. No. 265-3665

[Certificate of Service filed August 13, 1970]

---

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANG,	:	
	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 2174-69
	:	
STEVENS COMPANY and M. R. NEUBAUER	:	
	:	
Defendants.	:	
	:	

Washington, D.C., July 30, 1970

BEFORE THE HONORABLE JOHN LEWIS SMITH, JR., United States District Court Judge, Motion:

APPEARANCES:

R. CADEAUX, Esq., for the Plaintiffs.

P. ATTRIDGE, Esq., for the Defendant Stevens Company.

P. WEINSTEIN, Esq., for the Defendants Neubauer.

PROCEEDINGS

THE COURT: All right.

THE DEPUTY CLERK: Thang versus Stevens Company, et al.

MR. WEINSTEIN: I will try to be brief. I know Your Honor's calendar is heavy.

THE COURT: We are running a little late.

I have read the motion. I have read the opposition thereto.

MR. WEINSTEIN: Your Honor, I would just like to point out several things.

Mr. Cadeaux has filed an original complaint against the SF and C Company who, under the lease, it was stated that their—I think alleging in the first complaint—they were lessors and in the second complaint, he now alleges that the Newbauer's are the lessors, although I have not seen the lease in which they have executed.

My motion is directed merely to the fact that in the second complaint, he alleges that the owners of the apartment house were Heather Neubauer, Richard Newbauer and Mildred Rose Neubauer.

He has only named Mildred Rose Newbauer as one of the defendants and I feel that if he does not name the other two defendants in this case, the mat-

3 ter would have to be litigated subsequent to that and that is really the heart of my motion.

I think that he should be compelled to name all of the defendants in this case at this time so we can once and for all litigate against one and all.

THE COURT: All right.

Mr. Cadeaux.

MR. CADEAUX: Your Honor, the lease in which we based our original complaint on was in fact signed by the original named defendant, SF and C, Inc.

Subsequently we discovered through a Stone's Mercantile Report, that on July 5, 1967 the Newbauer's did purchase the property and were the proper owners of the property prior to the act, we allege, Your Honor, as being negligent which occurred in September of '67.

That is the reason for our amending our complaint initially.

It is my understanding, Your Honor, that the other defendants the owners of the property, are not in the jurisdiction and that being the case, there would be no way that we could properly join them in the case.

I believe that the defendant will in no way be damaged by a non-joinder
4 of the other owners of the property.

I believe that he could seek contribution if there is a judgment in favor of the plaintiff from the other defendants, and as a practical matter, the one defendant, the one that Mr. Attridge represents, I don't believe is a party to this motion and I have that corporate entity in the case.

THE COURT: Now, the plaintiff's in this proceeding are from Virginia?

MR. CADEAUX: Yes, I believe so, Your Honor.

THE COURT: Thang and Thang, 8303 Lee Lane, Vienna, Virginia.

MR. CADEAUX: They presently do live in Virginia.

At the time of the alleged acts, they lived in the District of Columbia and I believe that the side of the wrong is in the District of Columbia.

I believe that the availability of witnesses ultimately of this case will be here.

THE COURT: I am not thinking of forum nonconvenience.

MR. CADEAUX: Therefore, the one defendant that we have served in the District of Columbia would not be amenable to service in Virginia.

5 I don't see any damage to the defendants—of the defendant by not joining the other defendants.

Unless Mr. Weinstein is prepared to tell me that they are available to

service in the District of Columbia, I would object very strongly to his position, Your Honor.

MR. WEINSTEIN: In answer to that, Your Honor, if these people were occupying the premise under a valid lease, I think their rental agent would be sufficient to obtain service upon them.

I think that—I think under the provisions of the lease, I think that would be prima facie evidence of agency on behalf of the rental agent and I think that service upon that rental agent would be sufficient.

MR. ATTRIDGE: I have nothing to say, Your Honor.

MR. CADEAUX: If the court please, with respect to Mr. Weinstein's statement, the burden I would have to carry to establish control of the rental agent over the property and over the management of the property would be an unfair burden and one which I would not have to carry against the owners of the property.

THE COURT: Well, Gentlemen, it seems to me there is substance to the motion.

There are indispensable parties not before the Court here.

I am concerned about one thing, also, This incident occurred September 27, 1967 and suit was not filed until August 1, 1969, almost two years later.

You are going to be confronted with the statute of limitations unless you move promptly, I would say, in Virginia, but this motion to dismiss for indispensable parties under Rule 19 will be granted.

MR. CADEAUX: One other thing: Instead of granting the motion, would you give me 30 days to obtain the—amend the—

THE COURT: You had better move if you are going to move and you had better move in the right direction.

The statute of limitations will run on you.

MR. CADEAUX: Very well, Your Honor.

Is that motion granted as to both of the defendants or just to Mr. Weinstein's defendant?

THE COURT: It is dismissed for lack of jurisdiction of indispensable parties.

MR. CADEAUX: Well, Your Honor, he is the plumber that did the work negligently. We are also suing the building owners and—

7 THE COURT: Have you served the building owners, Mr. Cadeaux?

MR. CADEAUX: No. That is who Mr. Weinstein represents, the building owners.

We would never be able to get service against the other defendant in Virginia.

THE COURT: His motion to dismiss is granted. You have not had service.

The complaint is dismissed for failure to join the parties under Rule 19 and so that applies to both defendants.

MR. CADEAUX: How am I to get service in Virginia?

THE COURT: That I don't know.

You do not have the parties necessary to bring this action, Mr. Cadeaux, in the District of Columbia.

[Certificate]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24,650

---

v.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

---

*Cases chiefly relied on.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,650

SAI L. THANG, et al.,

Appellants,

v.

S. F. & G., INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF QUESTION PRESENTED

Did the District Court err in dismissing appellants' Amended Complaint on the ground that under the Federal Rules of Civil Procedure, Rule 19, the appellants failed to join indispensible parties to their action?

RULE INVOLVED

Rule 19, Federal Rules of Civil Procedure.

COUNTER-STATEMENT OF CASE

The appellants sued in the United States District Court for damages allegedly sustained as the result of water damage to their property. Appellee, Mildred Rose Neubauer, was named as one of the defendants along with D.H. Stevens Co.

Paragraph 1 of appellants' Amended Complaint[1] states that Heather J. Neubauer, Richard J. Neubauer, and appellee, Mildred Rose Neubauer, were the lessors of the premises, 2013 New Hampshire Ave., N.W., Washington, D.C., Apt. 811, the apartment occupied by the appellants.

According to the land records of the District of Columbia, the above described property is in fact owned by Mildred Rose Neubauer, unmarried; John C. Neubauer and wife; and Richard Pekin and wife.[2] The property is held as tenants in common, each owning a one-third undivided interest.

The appellants duly served the appellee, Mildred Rose Neubauer, with process on June 15, 1970. A motion to dismiss for failure to join indispensible parties was filed on June 24, 1970, said motion argued and granted on July 31, 1970.

ARGUMENT

The appellee, Mildred Rose Neubauer, pursuant to Rule 19(b) of the Federal Rules of Civil Procedure filed a motion to dismiss the appellants' Amended Complaint for failure to join an indispensible party. It is obvious from appellants' pleadings in the District Court, and also in their brief in this

---

[1]Page 6 of appendix to appellants' brief.

[2]Land Records of the District of Columbia Liber 12769, Folio 540.

case, that they have not ascertained the true owners of the property in question; therefore, these parties to the action were not named as co-defendants. A close inspection of the land records for the District of Columbia by appellants or their counsel would have revealed the proper owners and enabled appellant to name those parties necessary to adjudicate this matter.

Under the facts of this appeal were there indispensible parties which appellants failed to name as defendants? In the case of *Shields v. Barrow*, 58 U.S. 130, 17 How 129, decided in 1854, the Court defines an indispensible party as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity or good conscience."

There is no question but that the owners of the property leased by the appellants were tenants in common, and fall within the definition as stated. In *Brodsky v. Perth Amboy National Bank*, 259 F.2d 705 (3rd Cir. 1958), a lawsuit involving tenants in common was at issue. The Court held that whether or not tenants in common are indispensible depends on the nature of the relief sought and the possible effects on their interests. If a judgment is entered against one co-tenant then the remaining co-tenants are indispensible parties.

A similar result was reached in the case of *Keegan v. Humble Oil and Refining Co.*, 155 F.2d 971 (5th Cir. 1946). In *Keegan*, a suit was filed to recover an undivided interest in land. The plaintiff upon court order joined parties necessary to fairly adjudicate the suit. However, plaintiff subsequently dismissed his action against all parties except Humble on the grounds that one party was a resident of the District of Columbia, and that his joinder would deprive the court of jurisdiction. Further,

that certain heirs of deceased defendants were unknown or could not be found. The court held that there were parties absent from the suit who were indispensible. Parties are indispensible, "[w]hen their interests in the subject matter of the suit and in relief sought are so bound up with that of the other parties that their interest would be directly affected by the decree". *Baltimore & Ohio Railroad v. Chicago*, 170 F.2d 654 (7th Cir. 1948).

Indispensible parties are all whose interests will be affected by the decree, that is, all persons materially interested either legally or beneficially in the subject matter. The fact that the decree would not be legally binding on the absent defendants is not the controlling factor. *Green v. Brosky*, 110 F.2d 539, 71 App. D.C. 299 (1940).

Surely, a judgment rendered in this case against only one owner would affect the rights of the owners not joined. A judgment against one owner would not allow appellant complete relief; it would only give rise to a suit for partition of the realty. It is apparent that if this happened the interests of the parties not joined would be directly affected.

In applying Rule 19, and specifically paragraph b, there are certain factors for the court to consider in determining whether joinder of parties is or is not feasible. An examination of each of these factors and their relation to the facts of the case at bar is of primary importance in the determination of whether the District Court's Order dismissing plaintiff's Amended Complaint for failure to join a party under Rule 19 of the Federal Rules of Civil Procedure, filed July 31, 1970, should be upheld.

First, to what extent would a judgment rendered in the person's absence be prejudicial to him or those already parties? The parties not joined in the case at bar were tenants in common. The common-law rule requires that tenants in common being "indispensible parties", must join as parties plaintiff in all personal actions concerning the common property. *Buss v. Prudential Ins.* 126 F.2d 960 (8th Cir. 1942). While the rule of that case is not binding

on this court, it is offered as strong support of the premise that any judgment rendered against the co-tenants who are absent would be prejudicial to them. Further, it has been held that where a lessee seeks to annul a lease of property held by four tenants in common, all the tenants must be joined. *Brodsky v. Perth Amboy National Bank*, 259 F.2d 705 (3rd Cir. 1958).

It should also be noted that the very nature of a cotenancy, each party owning an undivided share, would cause any judgment to be prejudicial which was rendered in the absence of one or more co-tenants. Since their interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties, their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed.

Second, to what extent, by protective provisions in the judgment, by the shaping of relief, or other measures, can prejudice be lessened or avoided?

In the case at bar money damages are being sought against one of the tenants of property held by a tenancy in common. It would be highly prejudicial, as well as inequitable, to force one co-tenant in the present action to answer for an alleged tort, committed by all the co-tenants. In addition it would be prejudicial and inequitable to adjudicate this case without allowing the absent co-tenants, whose interests are bound up with that of the present co-tenant, to defend their case as well. With the absence of the co-tenants in the case at bar it would therefore be impossible to quit relief that would avoid prejudice to either the absent persons or the one already a party.

Third, would a judgment rendered in the person's absence be adequate? It has been held that one co-tenant cannot bind the interest of another in absence of assent or ratification. *Corsney v. Edward Small*, 52 F. Supp. 559 (S.D.N.Y. 1942). Since the present co-tenant owns only a one-third undivided interest in the property, he cannot be held fully liable for the damages demanded. He is not a

joint tortfeasor since his interest in the property is not joint but undivided. Co-tenants do not merely by virtue of their relationship, sustain the relationship of "principal and agent" to each other, and they are not "partners".

In *Jewell Tea Co. v. Eagle Realty Co.*, 70 F. Supp. 918 (D. Neb. 1947), partners are joint owners and would be jointly and severally liable in tort, but this relationship does not exist in the case at bar.

Fourth, will the plaintiff have an adequate remedy if the action is dismissed for nonjoinder?

The plaintiff will have an adequate remedy should this dismissal for nonjoinder be upheld. The defendants maintain a resident agent on the premises who for all purposes acts on their behalf regarding the property. Service, if successfully made on this agent, could compel the defendants to come under the jurisdiction of the court. It should be noted that there is now pending in the Circuit Court for Fairfax County, Virginia an action by *Sai L. Thang et ux v. John C. & Heather Neubauer and D. H. Stevens Company*, Law No. 23548, which recites the same facts as stated in appellants' Amended Complaint Appendix, page 6, with the sole exception that counsel for appellants has joined all the owners of the property in question. Additionally, a similar complaint in the United States District Court for the District of Columbia, Civil Action 2862-70 *Sai L. Thang et ux v. Frank S. Phillips, Inc. and Floyd E. Davis Company* has been filed and is pending.

CONCLUSION

Whether or not tenants in common are indispensible depends on the nature of the relief sought and the possible effects of a judgment on their interests. In the case at bar, there would be substantial effects on the interests of the absent co-tenants as a judgment could require a partitioning of the realty. In addition, an obvious inequity would result if the appellee/co-tenant were held solely liable for the

tort alleged to have been committed by the owners of the property, i.e., co-tenants holding an undivided one-third interest in the property. Therefore, the District Court's Order dismissing plaintiff's action for failure to join an indispensible party should be affirmed.

Respectfully submitted,

Paul H. Weinstein
Laurence Levitan
M. Michael Cramer
1225 Connecticut Ave., N.W.
Washington, D. C.
Attorneys for Appellee